PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

BILLS AND NOTES.

Indorsement by Attorney in Fact

Balcom v. *O'Brien*, 83 Northwestern, 562 (South Dakota), discloses some pretty serious bungling on the part of the attorney for the defendant. The suit was on a note, and the indorsement was in the name of the payee, "per George N. Farwell, his Attorney in Fact." This was offered in evidence by the plaintiff and was admitted, defendant's attorney making no objection. Later he asked that a verdict for defendant be directed, because the plaintiff had not proved George N. Farwell, the attorney in fact of the payee. But the court held the objection made too late; that when the note was offered was the time when the plaintiff should have been called on to prove Farwell's attorneyship, and allowing the note to be admitted without objection precludes him from raising this question later.

Guaranty Action to Enforce

The principle that a writing on the back of a note, "We hereby guarantee the payment of the within note," does not constitute an indorsement, but under the Massachusetts rule a non-negotiable chose in action, is reiterated in the case of *Edgerly* v. *Lanson*, 57 Northeastern, 1020. The court also in the same case applies the well-established rule that a transfer of a note after maturity, though without consideration, for the purpose of having the transferee bring an action thereon, entitles him to maintain such action in the right of the transferor.

CONSTITUTIONAL LAW.

State Regulation of Rates

The efforts on the part of various States to control the rates charged by railroads have been fruitful of litigation, and cases seem always to leave some undecided point. In *Louisville & N. R. Co.* v. *McChord*, 103 Federal, 216, a statute of Kentucky passed so late as March 10, 1900, after many of the important decisions in reference to those State enactments, is held a violation of the Fourteenth Amendment and unconstitutional on several grounds: first, because it allowed a commission to fix the

CONSTITUTIONAL LAW (Continued).

rates of one particular railroad without the necessity of such rate being general, thus denying to such company the equal protection of the laws; and second, because it made the basis of the regulation of rate the fact that such railroad had charged extortionate rates, and left the decision of this latter question to the commission, a non-judicial body, free to determine in its own discretion what should constitute extortion. This commission was authorized to act merely upon notice sent to an employe of the company, and if it found that the rates hitherto charged were extortionate there was no appeal from its finding. The law in such case allowed it to fix rates at what it regarded as just and reasonable. The Circuit Court of the United States (D. Kentucky) held that this combination of provisions clearly provided for a taking of property without due process of law and could not be upheld.

The act was further held invalid because the charter of the railroad company in this case fixed the maximum rates it might charge, and the court held that this act, without attempting to repeal such charter, empowered the railroad commission to subject the company to criminal prosecution and heavy punishment for charging the rates therein authorized.

Taxation, Original Package Rule

The well-known original package rule finds a late application in *May & Co.* v. *City of New Orleans*, 20 Supreme Court Reporter, 976. The case turns on what is an original package, and in this case the tax imposed by the city of New Orleans is held not to be violative of the Federal Constitution, because while the goods were retained in certain packages in which they were received, yet the "boxes, cases or bales in which the goods were shipped were the original packages." When these were opened the package was broken and its contents became mingled with the general mass of property in the state, notwithstanding that inside these "boxes, cases or bales" the goods were packed in smaller packages, which latter packages remained unopened when the tax was imposed.

Depositions, Right to be Confronted with Witnesses

The constitutional provision securing to the accused the right to be confronted with the witnesses against him has frequently been argued to affect the right of the United States to use depositions of absent witnesses. In *Motes* v. *United States*, 20 Supreme Court Reporter, 993, this provision was held to prevent, on the final trial of the defendant, the use of the deposition or statement of an absent witness taken at an

CONSTITUTIONAL LAW (Continued).

examining trial, where it did not appear that the witness was absent by the suggestion, connivance or procurement of the accused, but where it did appear that his absence was due to the negligence of the prosecution. There had been an opportunity for the defendant to cross-examine, but this was regarded as insufficient, when it clearly appeared that failure to produce the witness himself resulted from unexplained negligence on the part of the officers of the government.

Street Improvement Assessment

Following *Village of Norwood* v. *Baker*, 172 U. S. 269, the U. S. Circuit Court (E. D. Michigan) holds in *Parker* v. *City of Detroit*, 103 Fed. 357, that the provisions in a city charter requiring the common council to assess the entire cost of paving upon the property abutting on the street pro rata according to the foot front of such property, without any reference to the question of benefits, the only notice required to lot owner being by publication in the city newspaper, and no tribunal having any authority to reduce the assessments or review the amount thereof—that all these provisions together constitute a mode of taking property which is not that due process of law required by the Fourteenth Amendment to the Constitution. No provision being made for an inquiry into the benefit accruing to the various properties from the assessment, it was *prima facie* manifest that such a method would not secure a just result.

Privilege of Witness

The provision in the Fifth Amendment of the National Constitution, that a man shall not be compelled in any criminal case to be a witness against himself, decides the case of *In re Feldstein*, 103 Federal, 269. The answers in that case would have disclosed that certain checks were given for gambling debts, the receipt of which under laws of New York, where the U. S. District Court was trying the case, is a criminal offence. It was sought to avoid this provision of the Constitution by claiming that Section 7a (9), in enacting that as respects the bankrupt—and this was a bankruptcy case—" no testimony given by him shall be offered in evidence against him in any criminal proceeding," protected also the witness in bankruptcy proceedings and deprived him of the constitutional privilege. But the court held that, even if the action in question should be so construed, this would not follow, because to enable the court to compel the witness to testify the law must be such that it for-

CONSTITUTIONAL LAW (Continued).

ever bars him from prosecution for the offence which his testimony discloses; otherwise, the constitutional privilege operates.

Law Prohibiting Sale of Gift of Transfer Tickets

All will admit that a court may not arbitrarily insert an intent into a statute, where no intent is expressed upon the face, but where this rule is applied—as it is by the dissenting justices of the Supreme Court of California in *Ex parte Lorenzen*, 61 Pac. 68—to nullify the plain intent of the statute and, in addition, to render the latter unconstitutional, a halt should be called. A San Francisco ordinance rendered it a misdemeanor for any person but an authorized street car conductor to "deliver, sell or give" to another any transfer of a street railway company. The majority of the court held that this was a valid exercise of the police power, as it certainly was; but the minority declared that it was unreasonable and in violation of the Fourteenth Amendment, because the ordinance did not declare in express terms that it was aimed only at fraudulent or illegal selling or delivery, and therefore, "if the conductor should give to a father traveling with his family three or four transfers, and he in turn should hand them over to his wife and children, he would at once become amenable to the ordinance!"

Privilege to One of a Class

State v. *Santee*, 82 N. W. 445, gives a blow to an important monopoly in the State of Iowa. A statute was passed prohibiting the sale of petroleum for illuminating purposes emitting a combustible vapor at less than a certain temperature, "except the lighter products of petroleum when used in the Welsbach hydrocarbon incandescent lamp." It being shown that there were other lamps constructed substantially upon the same principle as the Welsbach lamp, the Supreme Court of Iowa properly declared the statute void, as an attempt to deprive the other lamp manufacturers of equal protection of the laws, as required by the Fourteenth Amendment.

Municipal Ordinance, Reasonableness

Municipal ordinances regulating the retailing of liquors and the opening and closing of saloons have generally been sustained. However, such ordinances may go too far. In *Mayor, etc.* v. *McCann*, 58 S. W. 114, the ordinance prohibited any owner of a saloon from entering his saloon on Sunday for any purpose, without special permission from the mayor of the town. The Supreme Court of Tennessee held the ordinance arbitrarily oppressive and void under the Fourteenth Amendment.

COURTS.

Jurisdiction in Suits Against Federal Receivers

Gableman v. *Peoria, etc., Rwy. Co.*, 101 Fed. 1, is an important case, passing, as it does, upon a question which must ultimately be decided by the Supreme Court of the United States. The Circuit Court of Appeals for the Seventh Circuit were called upon to decide whether or not an action against a receiver of a railroad for negligence in the operation of the road is removable into the Federal court solely on the ground that the receiver has been appointed by a Federal court. Judge Grosscup, in a well-reasoned opinion, decides that the action is not so removable, since it does not bring into question any matter connected with a law of the United States, or the decree appointing the receiver. The remarks of Fuller, C. J., in *Pope* v. *Rwy. Co.* 173 U. S. 573, are taken to be an "*ex cathedra* announcement" of the doctrine, but it is not always safe to put too much reliance upon such *dicta*.

CRIMINAL LAW.

Jurisdiction of U. S. Supreme Court

The case of *Motes* v. *United States*, above referred to, settles the rule that though under ordinary circumstances appeals from judgments of the U. S. District Court in criminal cases, where the offence is not capital, are only to the Circuit Court of Appeals, yet where the case involves a consideration of a right claimed under the Federal Constitution an appeal may be taken directly to the Supreme Court.

DAMAGES.

Conversion, No Reduction because Plaintiff Guilty of Actionable Wrong.

The difficulty of attempting to try two issues in one, which has had so much influence in the development of the doctrine of set-off, appears to be the determining element at the basis of the New Jersey decision of *Wyckoff* v. *Bodine*, 47 Atlantic, 23. In that case A., the owner of woodland, sold timber to B. B. cut, but failed to remove in agreed-upon time. A. converted part of the lumber. B. sues A. for this conversion and it is held that the measure of damages is the value of timber taken at the time A. converted it; and that A. may not claim in reduction of this that he has been injured by B.'s having left the timber on his property without legal right. This gives him a cause of action against B., but he must enforce it in another suit.

DEATH AS A CAUSE OF ACTION.

Rights of Statutory Beneficiaries after Settlement by Injured Party

Whether or not a settlement between an injured person and the party by whom he is injured deprives the persons, who would have a cause of action by statute in the event of his death, of their remedy is the question presented in *Southern Bell Telephone & Telegraph Co.* v. *Cassin*, 36 Southeastern, 881. Under the English decisions, construing Lord Campbell's Act, such settlement is held a bar to further proceedings, whether by the personal representatives of the decedent or the statutory beneficiaries. This is a result largely of the language of the act which gives this new remedy in such cases, as the deceased had a cause of action at the time of his death. If he has settled, of course he had no cause of action at the time of his death, and in such case the act does not confer any, but leaves matters as at common law.

The language of the Georgia Code is not conclusive as it is in Lord Campbell's Act, but gives a right of action where death is caused by negligence to certain relatives of the deceased; yet the Supreme Court follows the doctrine of the English courts and holds the settlement by the injured party before his death a bar to any recovery under the statute thereafter. The court enters into a careful review of the cases on this subject in the various courts of the country, and reaches its conclusions on general principles extra the language of the statute. The decision of the court is opposed by a vigorous dissent on the part of Justice Colb, which is concurred in by another justice of the court.

GUARDIAN AND WARD.

Note of Guardian Consideration

The Supreme Court of California holds in *Wright* v. *Perry*, 62 Pacific, 176, that an indebtedness incurred by a guardian of the estate of a minor is not a good consideration for a note by the successor of such guardian. An effort was made to hold the ward on the ground of a ratification, in that she had knowingly received the benefits derived from the expenditure of such money, but the court held that as none of these benefits accrued after her coming of age she could not be held even though she had not expressly disavowed liability on attaining her majority.

HUSBAND AND WIFE.

Incidentally illustrating the modern tendency of the law to depart from the original theory of the legal unity of husband

HUSBAND AND WIFE (Continued).

Domicile of Child in Custody of Divorced Wife.

and wife; the case of *Hicks* v. *Fox*, 83 Northwestern, 538 (Minnesota), refuses to follow the strict common law rule that until majority the domicile of a child is always that of its father, but holds that where the wife has been divorced and the custody of the child awarded to her unrestrictedly, the domicile of the child is that of the mother. The common law theory, the court says, merged the legal entity of the wife in that of her paramount lord, and until recent enabling statutes she had no separate legal existence; from which "it followed as a logical necessity that the residence of the wife and mother, even in cases of separation, did not control and fix the domicile of the marriage offspring."

Contract between Husband and Wife

Yet notwithstanding the many innovations of the past century, common law rules are continually reappearing in the decisions, for in the Supreme Court of Massachusetts the old rule that a wife could not contract with her husband was recently re-enforced under the following circumstances: The plaintiff had loaned money to a married woman and received in return her notes payable to her husband and indorsed by him and others to the plaintiff. It was held that the note was void *ab initio;* no recovery on the notes could be had against the administrator of the estate of the maker, she being deceased. It was argued that the administrator was estopped to deny the validity of the note, but there being no allegation of fraudulent conduct inducing plaintiff to take the notes, the court held there was no foundation whatever for an estoppel. However, court holds that an action on the common counts in *assumpsit* for money lent or for money had and received could be maintained: *National Granite Bank* v. *Tyndale*, 57 Northeastern, 1022.

Antenuptial Contract

The New Jersey Court of Chancery in *Russell* v. *Russell*, 47 Atlantic, 37, makes a pretty thorough review of the law relating to the strict good faith required in the formation of such a contract. The parties, as the books put it with almost unconscious humor, are not treating with each other "at arms' length," and the conduct of the husband to be towards his fiancée in inducing her to enter into such an agreement is most carefully scrutinized. An agreement which deprives her of rights which she would have had under the law in the absence of such agreement throws on the husband the burden of proving that it was

HUSBAND AND WIFE (Continued).

entered into by her with full knowledge of what she was resigning. But no presumption will be raised that the agreement does deprive her of such rights. "It is only when it has been established by sufficient evidence that there is reason to believe that the intended wife has been misled . . . that the burden of proof shifts," and obliges the husband to establish the good faith of the transaction.

INSURANCE.

Mutual Insurance Company, Violation of Charter

Although a member of a mutual insurance company is chargeable with notice of the provisions of the company's charter, yet this notice is "of a very vague and shadowy character," and courts are slow to enforce it to the disadvantage of the member. Thus in *Watts* v. *Life Association*, 82 N. W. 441, the company issued a policy in return for assessments at a lower rate than that allowed by the charter. In an action on the policy, the Supreme Court of Iowa applied the Pennsylvania rule as to *ultra vires* contracts, and held that the company, having received the assessments, could not set up in defence its own violation of its charter. It may be said that, while the decision may appear very fair to Mr. Watts, yet if the courts intend to lay down the rule that each member of a mutual company may persuade the officers to issue him a policy without requiring him to pay sufficient assessments in return for it, a number of receivers will be needed for mutual insurance companies.

Waiver of Provision in Regard to Other Insurance

In *Northern Assur. Co.* v. *Building Ass'n.*, 101 Fed. 77, an action was brought upon a policy of insurancs containing the usual clauses that notice of other insurance must be endorsed upon the policy, and that no agent should have power to waive any provision, etc. The Circuit Court of Appeals (Eighth Circuit) decided that the mere delivery of the policy by an agent who had knowledge of the other insurance and acceptance of the premium by him amounted to a waiver of the breach of the condition, since the clause as to the non-ability of agents to waive conditions was nugatory, as far as it concerned acts done previous to the inception of the contract. This is the view generally taken by the Federal courts, but the dissenting opinion of Sanborn, J., is supported by the case of *Carpenter* v. *Ins. Co.*, 16 Pet. 495, and by a number of state decisions.

MASTER AND TENANT.

Injury to Employe, Liability for Acts of Foreman.

The development of the fellow-servant rule during this century has helped to bring out with greater clearness the duties of a master to a servant, inasmuch as the question whether A. is the fellow-servant of B. is frequently solved by answering the question whether or not to A. have been delegated some of those duties which the master owes to his servants. In such case he cannot under the fellow-servant rule escape liability for their negligent performance by A. This principle is enforced by the United States Circuit Court (D. Montana) in *Ellis* v. *Northern Pac. Ry. Co.*, 103 Federal, 416, where it is applied to the general duty of the master to provide his servant with a safe place of work. He still remains responsible for failing to do so, though such failure arises through the negligence of another employe, the foreman, to whom he has sought to delegate this responsibility.

Duty to Furnish Safe Place to Work.

The general doctrine with respect to this duty of the master to furnish a safe place of employment, together with the question of how far the servant's knowledge of the insecurity and assumption of the risk affects the matter, is pretty thoroughly discussed in *Mason* v. *Yockey*, 103 Federal, 265, the United States Circuit Court of Appeals coming to the conclusion that the employe had a right to presume the place of work was safe, and that it was for jury to say how far his knowledge of the facts that tended to render the place insecure and his continuance of work in spite of such knowledge showed contributory negligence.

NEGLIGENCE.

Accident at Crossing

The tendency of the courts to lay down rules in railroad negligence cases as to what constitutes negligence appears in *Hoopes* v. *West Jersey & Seashore R. Co.*, 47 Atlantic, 27 (New Jersey). In that case plaintiff was driving in a sleigh at night along public highway, and on coming near railroad track, looked up and down to see whether a train was coming. He claimed that, though he saw various lights along the track, he did not notice that any was moving. In fact, one was the headlight of an engine, which struck plaintiff as he drove upon the track. It was held that there being no other danger to distract the plaintiff's attention, he should, in the exercise of ordinary care, have looked with sufficient care to have detected that one of the lights was moving, and then should have waited until reasonably assured that it was safe to cross, and that his not doing so was negligence, which contributed to his injury and prevented a recovery.

NEGLIGENCE (Continued).

Presumption from Explosion

Where an explosion on the land of the defendant injures persons or property on adjacent lands, does the rule of *res ipsa loquitur* apply? In *Bradford Co.* v. *Woolen Co.*, 54 N. E. 528, the Supreme Court of Ohio says that it does apply in the case of an explosion of nitroglycerine; while in *Bishop* v. *Brown*, 61 Pac. 50, the Court of Appeals of Colorado says that it does not apply in the case of an explosion of a steam boiler, and both courts cite the same authorities and profess to lay down the same propositions of law. Evidently the line is to be drawn somewhere between nitroglycerine and steam boilers—just where, it is hard to say. Injuries resulting from blasting rocks are generally held to raise the presumption: *Rwy. Co.* v. *Eagles*, 9 Colo. 544.

REAL PROPERTY.

Natural Right to Flow of Water by Riparian Owner

The United States Circuit Court (S. D. New York), in *Pine* v. *Mayor, etc., of City of New York*, 103 Federal, 337, outlines the rights of a riparian owner to the flow of the water in its natural course, not as an easement or appurtenance, but as "inseparably annexed to the soil" as "parcel of the land itself." It states the rules of the Connecticut court, than which no courts, says the judge in this case, have stated the law more clearly. The case holds that a municipal corporation may not justify its taking of the water from the stream on the ground of public benefit, unless compensation has been made either by agreement or under process of law, and where this has not been done the riparian owner may have even as against it an injunction against the further use of the water, and not merely his remedy at law for damages, since the injury being a continuing one, this latter remedy is inadequate. This is held to be the law, "though the pecuniary damage to the riparian proprietor is not of large amount."

SALES.

Illegality of Purpose for which Property is to be Used

In *Standard Furniture Co.* v. *Van Alstine*, 62 Pacific, 145, the Supreme Court of Washington holds entirely void a conditional sale of certain property where it appeared that the vendor knew that property was to be put to an immoral use. The decision is complicated by the fact that the rights of third parties were involved. Creditors of the vendee having gotten judgment against him, took the property in queston on execu-

SALES (Continued).

tion. They were then sued by the original vendor, and it was held he could not recover. It seems illogical to hold, as the court does, that the conditional sale is void, and yet that vendor cannot recover the property. If the sale is void no change can have been made in the title and it must remain in him. A more natural construction appears to be that in a contract of sale with reference to an illegal object, the court will intervene in favor of neither party, and hence in this case would not help vendor as against the defendant, who here stood in the shoes of the vendee.

Insanity of Purchaser

The void character of a contract or conveyance by an insane person is well illustrated in the case of *Bates* v. *Hymar*, 28 Southern, 567. The Supreme Court of Mississippi there holds that where an insane person has given a note and a trust deed to secure the price of goods he has received, an offer to return the property was not a condition precedent to his right to avoid the deed and escape liability on the note.

TRADE MARKS AND TRADE NAMES.

Infringement

The disposition of the courts to decide whether commercial labels, wrappers, names etc., do or do not interfere with the prior use of others, depend on whether " the similarity " (between the two) is such as is calculated to mislead the careless and unwary, is well illustrated by the facts in *Monopol Tobacco Works* v. *Gensior*, 66 N. Y., supp., 155.

Right to Protection

But the Circuit Court of the United States (Eastern District of Michigan) holds (*American Washboard Co.* v. *Saginaw Mfg. Co.*, 103 Fed. Rep., 281), quoting from a former decision that: " It is the party who uses it [*i. e.*, the trade name] first as a brand for his goods, and *builds up a business* under it, who is entitled to protection, and not the one who thought of using it on similar goods, but did not use it. The law deals with acts, not intentions."

TRUSTS.

Bona fide Purchaser

Apparently the addition of the word " trustee " to a grantee's name in a deed should be enough to put the purchaser from him on notice as to nature of the estate conveyed. But under the circumstances of the case of *Rua* v. *Watson*, 83 Northwestern, 572, the

TRUSTS (Continued).

Supreme Court of South Dakota held that, notwithstanding this designation of the grantee, the purchaser from him for value got a good title. No notice appeared apart from this word in the grantee's deed; and the *habendum* and *tenendum* of the deed, "to have and to hold unto the said party of the second part, his heirs, successors and assigns forever," was held in connection with the other provisions of the deed to give a power of sale to the grantee, though called "trustee." It further appearing that there was an oral agreement that this grantee might sell, but should transfer the money to the grantor, the court held that the grantee had a right to sell, and his vendee took a clear title without any liability to the original grantor, either in reference to selling and the application of the purchase money or otherwise. The court says: "It was incumbent on respondent to prove that appellant had actual or constructive notice of such restriction, and the mere employment of the word 'trustee' after the name of Walker is insufficient to create a trust or operate as notice of any kind to appellant."

Changed to Relation of Debtor and Creditor

In *Treadwell* v. *Treadwell*, 57 Northeastern, 1016, the Supreme Court of Massachusetts decides that an agreement between trustee and *cestui que trust* is effectual to change trust relation into that of debtor and creditor; and that the payment of interest by the original trustee to *cestui que trust* is inconsistent with a trust relation, but applies to that of debtor and creditor.

WILLS.

Revoking Clause in Destroyed Will

Whether a revoking clause in a properly executed will is of effect from the date of the execution of the will, or is merely ambulatory and stands or falls with the will is a question which has not always received the same answer. It directly arose in the Supreme Court of South Dakota, and the court holds, without a discussion of the point, that the revocation is complete, though the revoking will is not found at the death of the testatrix. *In re Bell's Estate*, 83 Northwestern, 564. In that case testatrix had made two wills, each containing a clause revoking all prior wills. At her death only the earlier will was found. It was held, however, that, though the later will must be presumed to have been destroyed by the testatrix *animo revocandi*, nevertheless the earlier one could not stand, it having been made null and void by the revoking clause of the will which was subsequently destroyed.

WILLS (Continued).

Palmer v. *Munsell*, 46 Atl. 1094, is a remarkable decision. A bequest was made "to my niece, — W." The testator had a niece, A. W., and two grandnieces, her daughters, B. W. and C. W. In a former clause of the will he had left a bequest to B. W., styling her "my niece." The Court of Chancery of New Jersey decided that this was a case of a latent ambiguity, and that, since the testator had called B. W. his "niece," it was to be presumed that the other bequest referred to his other grandniece, C. W., and not to his niece A. W. It would certainly seem that there was no latent ambiguity in the bequest, since the real niece, A. W., answered the description, and was the only person who did so; therefore there was no room for construction.

Latent Ambiguity, Construction

In *Healy* v. *Healy*, 66 N. Y. Suppl. 82, the decedent promised the parents of the plaintiff that if they would allow the plaintiff to live with him, he would leave her, at his death, a child's share of his property. The Supreme Court of New York decided (1) that there was a sufficient consideration for the contract to make the will, by the release by the plaintiff's parents of her custody to the decedent; (2) that twenty years' residence with the decedent by the plaintiff was sufficient performance to take the case out of the statute of frauds; and (3) that the fact that the decedent had a child born subsequent to the contract did not deprive the plaintiff of her right, but operated merely to cut down her share.

Contract to Make Will